action already agreed to will in fact go through." We refer to and respectfully agree with the exposition of the principle in *Master* v. *Cameron*[15] cited with approval in *Daiman Development Sdn. Bhd.* v. *Matthew Lui Chin Teck.*[16]

The weaknesses of the appellants' case are, in our view, exposed by the events that followed beginning from the letter sent by C.H. Williams dated March 3, 1976 and the further letter from the respondent's solicitors to the appellants' solicitors confirming the essential terms of the oral contract concluded on March 3, 1976 in respect of which no disagreement whatsoever was raised by the appellants until March 22, 1976 when out of the blue they asked for a 20% instead of 10% agreed earlier and further asked that the remaining deposit of $45,447.68 be forwarded by March 31, 1976 in order to enter into a binding contract failing which the negotiation for the sale and purchase would be treated as abortive. Even though this was a departure from the term agreed upon by the parties the respondent nevertheless within a reasonable time, complied with the request. What clearly emerges from the appellants' letter of March 22, 1976 was that not only there was a departure from one of the terms of the concluded contract but also an imposition by the appellants of an arbitrary short period for the respondent to comply. In our view, there was a reckless attempt on the part of the appellants to abort the contract.

The respondent's counsel cited a number of authorities to support his submission that a construction of the documents and a review of the documents indicate in no uncertain terms that a formal contract was not a condition. We choose only to note these cases, they are the following: *Bonnewell* v. *Jenkins*[17] *Bolton Partners* v. *Lambert*[18] *Shankarlal Narayandas Mundade* v. *New Mofussil Co. Ltd.*[10] *Griffiths* v. *Young*[6] *Godecke & Anor.* v. *Kirwan*[19] *Daiman Development Sdn. Bhd.* v. *Matthew Lui Chin Teck & Anor.*[16] Some of these cases were already considered by the learned Judge in his grounds of judgment.

It is our finding that, in the light of all the circumstances of this case, the learned Judge had not erred either in law or fact in arriving at the finding that he did. It is also our finding that on the evidence and the exhibits it was the intention of the parties to come to a definite and complete agreement on the subject of the sale and the mere fact that a written contract had to be drawn up and executed by them did not necessarily mean that there was no legally binding and enforceable agreement. (See *Harichand* v. *Govind*)[9]. In our judgment a legally binding and enforceable agreement was concluded on March 3, 1976. For reasons we have stated this appeal is accordingly dismissed with costs.

Appeal dismissed

Solicitors: *Shook Lin & Bok; Ting Poi Tek & Co.*

THEIN THAM SANG v. UNITED STATES ARMY MEDICAL RESEARCH UNIT & ANOR.

[F.C. (Wan Suleiman, Seah & Mohamed Azmi F.JJ.) January 1 & March 30, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 80 of 1982]

Administrative Law – Mandamus – Industrial Court – Application by workman for reinstatement – Death of workman before hearing – Whether proceedings abated on death – Application by personal representative to continue proceedings – Refusal of Industrial Court – Industrial Relations Act, 1967, s. 20(3).

Industrial Law – Application by workman for reinstatement – Death of workmen before hearing by Industrial Court – Proceedings struck out – Application by personal representative to continue proceedings – Industrial Relations Act, 1967, s. 20(3).

In this case one Elizabeth Thein had been summarily dismissed by her employer, the first respondent. She made representations and her complaint was referred to the Industrial Court. Before the reference could be heard she died. Her widower and personal representative (the appellant) applied to continue the proceedings in the Industrial Court but the Industrial Court held that the proceedings had abated with the death of the workman and struck out the proceedings. The appellant applied for an order of mandamus to order the President, Industrial Court, to carry on the proceedings but the application was refused in the High Court – see [1983] 1 M.L.J. 97. The appellant appealed.

Held, a claim under section 20(3) of the Industrial Relations Act is personal to the non-union workman and it abates on the death of the workman. The maxim *actio personalis moritur cum persona* applies to the facts of this case.

Case referred to:

(1) *Assunta Hospital* v. *Dr. A. Dutt* [1981] 1 M.L.J. 115.

FEDERAL COURT.

C.T. Khaw for the appellant.
C.V. Das for the respondent.

Cur. Adv. Vult.

Seah F.J. (delivering the Judgment of the Court): This is an appeal against a judgment of the learned judge refusing to make an order of mandamus directed at the President of the Industrial Court. The brief facts insofar as they are relevant to this appeal are these:

One Mrs. Elizabeth Thein nee Lee Geak Choo (now deceased) was employed by the United States Army Medical Research Unit (hereinafter referred to as the Employer) as a Supply Supervisor. On February 14, 1980 the Employer summarily terminated her service. She considered that she had been dismissed without just cause or excuse and made representations in writing within the prescribed time to the Director-General of the Industrial Relations to be reinstated in her former employment. Since there was no settlement the Minister of Labour and Manpower was duly notified and the Minister, in the exercise of his discretion, referred the complaint to the Industrial Court for an award under section 20(3) of the Industrial Relations Act 1967 (as amended) (hereinafter referred to as the Act).

Before the reference could be heard Mrs. Elizabeth Thein died intestate on January 7, 1981. Her widower and personal representative, Thein Tham Sang, attempted to continue the proceeding in the Industrial Court and applied that he be substituted in place of the deceased. This was opposed by counsel for the Employer who argued, *inter alia*, that the proceeding in the Industrial Court had abated upon the death of Mrs. Elizabeth Thein. The President of the Industrial Court agreed with his submission and struck out the proceeding.

In the High Court, Thein Tham Sang appeared in his capacity as legal representative and administrator of the estate of Mrs. Elizabeth Thein nee Lee Geak Choo (deceased) and prayed for an order of mandamus. Counsel for the Employer repeated the same submission before the learned judge and again it was upheld. The application was dismissed with costs.

Thein Tham Sang was dissatisfied with this decision and had appealed to this court. Henceforth, Thein Tham Sang will be referred to as the appellant and the Employer as the respondent.

2. Reference has been made to the Employment Protection (Consolidation) Act 1978 of the United Kingdom. Under this Act there are express provisions dealing with such an event like the death of a workman when his case is pending in the industrial tribunal. Rule 2 of Schedule 12 provides that "where an employee or employer has died, tribunal proceedings under any of the relevant provisions may be instituted or continued by a personal representative of the deceased employee or, as the case may be, defended by a personal representative of the deceased employer". In such a case any award made by the industrial tribunal shall be in such terms and shall be enforceable in such manner as may be provided by regulations made by the Secretary of State (Rule 3(a)). And Rule 10 reads:

> "Where an employee has died, then, unless an order for reinstatement or re-engagement has already been made, section 69 shall not apply; and accordingly if the industrial tribunal finds that the grounds of the complaint are well-founded the case shall be treated as falling within section 68(2) as a case which no order is made under section 69"

3. No such provisions are contained in the Industrial Relations Act 1967 (as amended) or in the Industrial Court Rules 1967 (P.U. 406).

4. Now, section 20 of the Act reads:

> 20(1) Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within one month of the dismissal, make representations in writing to the Director-General to the reinstated in his former employment; the representations may be filed at the office of the Director-General nearest to the place of employment from which the workman was dismissed.
>
> (2) Upon receipt of the representations the Director-General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at ..... Where the Director-General is satisfied that there is no likelihood of the representations being settled ..... the Director General shall notify the Minister accordingly.
>
> (3) Upon receiving the notification of the Director-General under subsection (2), the Minister may, if he thinks fit, refer the representations to the court for an award.
>
> (4) Where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal.
>
> (5) (not relevant to this appeal).

5. It was submitted by learned counsel for the appellant that notwithstanding the death of Mrs. Elizabeth Thein the reference under section 20(3) of the Act must be adjudicated upon by the Industrial Court after the appellant has been substituted as a party in place of the deceased under section 29(a). Apparently, learned counsel was relying on a passage in the judgment of Chang Min Tat, F.J. in the Federal Court case of *Assunta Hospital* v. *Dr. A. Dutt*[1] at page 116 where the learned judge said:

> "..... Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seised with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may result in an order for mandamus ....."

6. For the respondent, it was argued by learned counsel that the provision of section 29(a) does not apply in that the Industrial Court has no power to order a legal representative or administrator of the estate of the deceased workman to be substituted. It was contended further than the power under sub-paragraph (a) should be given a restricted construction.

7. In our judgment, the Assunta Hospital case *(supra)* can be distinguished from the facts of the present case in that the workman Dr. Dutt was still living when the appeal was heard. Whereas here the workman Mrs. Elizabeth Thein was already dead. In our judgment, the observation of the learned judge should be confined within the context of that case.

8. "Party" with reference to a trade dispute, means a trade union or workmen acting for all or any number of its members in the trade dispute, or an employer acting for himself in the trade dispute, or a trade union of employers acting for all or any number of its members in the trade dispute (see section 2). Having further regard to the definitions of "trade dispute" and "workman" in section 2 thereof, we are of the view that the word "party" in section 29(a) of the Act does not include the legal representative or administrator of the estate of the deceased workman.

9. Support for this narrow interpretation may be found in the provision of section 27(1)(c) and (d) of the Act which read as follows:

> 27(1) A party to a trade dispute, or to a reference to the court under section 20(3), may at proceedings before the court –
>
> (a) .....
>
> (b) .....
>
> (c) where the party is a workman (in proceedings under section 20(3)), appear himself personally;
>
> (d) where the party is a trade union, or an employer, or a workman (in proceedings under section 20(3)), be represented with the permission of the President or the Chairman, by an advocate .....

If the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under section 20(3) of the Act, express provision would be provided for it in the Act. But none was so provided either in the Act or in the Industrial Court Rules 1967.

10. Having regard to the abovementioned facts, we agree with the learned judge that proceedings under section 20(3) of the Act are a claim personal to the non-union workman and that it abated on his death. In short, the maxim *actio personalis moritur cum persona* applies to the facts of this case. In the result, we dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Shook Lin & Bok.*

LEE LAU & SONS REALTY SDN. BHD. v. TAN YAH & ORS.

[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Seah F.JJ.) February 7 & March 30, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 70 of 1982]

Tort – Negligence – Breach of statutory duty – No sufficient evidence to show that person injured who died was an employee of the appellants – Finding that deceased was independent contractor and invitee – Duty of occupier to invitee – Unusual danger – Not pleaded or proved.

In this case the appellants operated a brick-making factory. They also owned a forklift machine which was under the management of one Tan Kam Sing. While repairs were being effected to the forklift, Tan Kam Sing (the deceased) was injured and he later died from his injuries. A claim was instituted for negligence or alternatively breach of statutory duty against the appellants. Ajaib Singh J. in the High Court found that there was insufficient evidence to say that the deceased was an employee of the appellants. He also held that the appellants were not in